82-1172

NO.

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

WILLIAM BRATTON,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

JOHN P. WHITE, JR.

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Counsel for Petitioner

QUESTION PRESENTED

Does a federal criminal defendant who has introduced evidence after his motion for judgment of acquittal at the close of the government's case in chief was denied, waive his right to challenge the sufficiency of the evidence on appeal if he fails to renew his motion for judgment of acquittal at the close of all the evidence?

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The petitioner, William Bratton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 2, 1982.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears in the appendix hereto. No opinion was rendered by the District Court for the District of Massachusetts.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1982. This petition for certiorari was filed within sixty days of that date, the sixty-day period being

computed in accordance with U.S. Supreme Court Rule 29.1. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rules of Criminal Procedure:

> RULE 29. Motion for Judgment of Acquittal
>
> (a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT OF THE CASE

The petitioner was convicted in the District Court for the District of Massachusetts on four counts of mail fraud (18 U.S.C. §1341), one count of interstate transportation of fraudulently obtained property (18 U.S.C. §2314), and one RICO substantive count (18 U.S.C. §1962(c)). The basis for the District Court's jurisdiction was 18 U.S.C. §3231.

At trial, the petitioner defendant moved pursuant to Fed. R. Crim. P. 29(a) for judgment of acquittal on all counts at the close of the government's case in chief. The motion was denied, and the defendant proceeded to introduce the testimony of one witness. The defendant failed to renew his motion for judgment of acquittal at the close of all the evidence, however.

On appeal, the Court of Appeals ruled that it was a close question whether the evidence was sufficient to sustain conviction on the four mail fraud counts. (Appendix, pp. 4-5) More specifically, the issue was whether the predicate mailings had been for the purpose of executing the alleged fraudulent scheme. (Id.) The Court of Appeals held, however, that the defendant had waived his motion for judgment of acquittal by failing to renew the motion after introducing evidence. The mail fraud convictions were consequently affirmed on the ground that the evidence was not so insufficient as to render the convictions clearly and grossly unjust. (Id. 4-5, 7-8).

The evidence relating to the mail fraud counts, viewed in the light most

favorable to the government and in summarized form, was as follows. In 1978 the motion picture The Brinks Job was produced in Boston, Massachusetts, by Brinks Production, Limited. A number of motor vehicle drivers were supplied under contract by Local 25 of the International Brotherhood of Teamsters to assist in production of the film. The defendant, as driver captain, personally supervised all the Teamster drivers on the production set. One of his responsibilities was on a weekly basis to distribute time cards to all the drivers, collect the cards after they had been filled in, approve them, and take them to the production manager for approval. Paychecks for each driver were prepared on the basis of the timecards by Production Payments, Inc., a company hired by Brinks Production,

Limited, to manage its payroll. The paychecks were then distributed to the drivers by the defendant.

Unbeknown to Brinks Production, two of the drivers for whom time cards were submitted, William O'Leary and Henry Gatto, did not appear for work and were employed full-time elsewhere during the production of the film. The "start-up" forms submitted for these two drivers at the beginning of their supposed employment and their weekly time cards were all filled out by the defendant without the drivers' authorization. The drivers did not receive the paychecks issued to them. Instead, the checks were cashed by one Joseph Manning, the Local 25 member responsible for dealing on behalf of the local with motion picture companies working in New England, and

who in this capacity had appointed the defendant to be driver captain for The Brinks Job. O'Leary and Gatto both later told the F.B.I. that they themselves had submitted start-up slips and had legitimately been on the payroll, though O'Leary later changed his story and admitted that he had not known anything about his supposed employment by Brinks Production until several months afterwards, when Manning asked him to help conceal the scheme from the F.B.I.

The four mailings upon which the mail fraud convictions were based were performed by Production Payments, Inc. Two of the mailings occurred in January 1979, when W-2 forms for 1978 were mailed to O'Leary and Gatto. The forms went to Manning's house because his address had been given on the

start-up slips for O'Leary and Gatto. Gatto attached his W-2 to his 1978 tax return; O'Leary did not.

The other two predicate mailings occurred in September 1978, after all paychecks for O'Leary and Gatto had been issued and cashed by Manning. The items mailed were remittance reports and contribution checks to two employee benefit funds maintained for Local 25 members. The remittance reports showed that O'Leary and Gatto had worked a certain number of hours, and the checks contained amounts withheld from O'Leary's and Gatto's wages as fund contributions. The benefit funds had no way of verifying whether the information contained in the remittance reports was correct.

REASONS FOR ALLOWANCE OF THE WRIT

The affirmance of conviction on the mail fraud counts in the instant case resulted from the Court of Appeals' application of the so-called waiver doctrine. The defendant was deemed to have waived his motion for judgment of acquittal when he introduced evidence, so that his failure to renew his motion at the close of all the evidence left the record without any formal objection to the sufficiency of the evidence. Appellate scrutiny was therefore limited to a determination of whether conviction was a clear and gross injustice.

Under the rules applied in two other circuits, however, the sufficiency of the evidence in the instant case would have been reviewed under the normal appellate standard of whether

the evidence reasonably permitted a finding of each essential element of the offense beyond a reasonable doubt (Jackson v. Virginia, 443 U.S. 307 (1979), rehearing denied, 444 U.S. 890 (1979)). The D.C. Circuit has abrogated the waiver doctrine, and thus reviews the correctness of the denial of a motion for acquittal made at the close of the government's case even if the defendant has introduced evidence. United States v. Pardo, 636 F.2d 535, 547 (D.C. Cir. 1980); United States v. Watkins, 519 F.2d 294, 297 (D.C. Cir. 1975). In deciding the question, only the evidence introduced in the government's case in chief is considered. (Id.) The Eighth Circuit has partially abrogated the waiver doctrine, so that the sufficiency of the evidence is reviewed despite the defendant's

failure to renew his motion at the close of all the evidence, but the determination is based upon all the evidence, not just the evidence introduced in the government's case in chief. United States v. Sanders, 547 F.2d 1037, 1040 n.5 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977); United States v. Burton, 472 F.2d 757, 763 (8th Cir. 1973).

The majority of the circuits join the First Circuit in giving the waiver doctrine full effect. United States v. Keuylian, 602 F.2d 1033, 1040-1041 (2d Cir. 1979); United States v. Trotter, 529 F.2d 806, 809 n.3 (3d. Cir. 1976); United States v. Sanders, 639 F.2d 268 269 (5th Cir. 1981); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979), cert. denied, 444 U.S. 994 (1979); United States v. Kampiles,

609 F.2d 1233, 1238 (7th Cir. 1979); United States v. Lopez, 625 F.2d 889, 897 (9th Cir. 1980); United States v. Morris, 623 F.2d 145, 152 (10th Cir. 1980).

The policy arguments in support of the waiver doctrine are extremely weak. The First Circuit justifies the rule on the ground that evidentiary challenges should be put in the first instance to the trial judge. (Appendix, p. 4) This ignores the fact that a motion for acquittal at the close of the government's case does require the trial judge to rule on the sufficiency of the evidence. Appellate review of the trial judge's denial of the motion thus does not offend against the rule that arguments not presented to the trial court should not be permitted on appeal.

It has also been suggested that the waiver doctrine prevents acquittal of guilty defendants by reason of mere careless or inept presentation of evidence by the government. 8A J. Moore, Moore's Federal Practice, ¶ 29.05 (2d ed.).

Trial judges frequently deny motions for acquittal because of the government's inability to appeal the allowance of such motions, and defendants usually introduce evidence in their defense because their failure to do so would likely insure conviction. The government therefore will typically have an opportunity to fill any inadvertent gap in its case during cross-examination in the defendant's case, and the waiver doctrine protects the government's belated repair work from reversal on appeal by preventing

review of the evidence as it stood at the close of the government's case in chief. (Id.)

The problem with this argument is that the waiver doctrine protects not only solid government cases that have been bungled, but also inherently defective government cases that could never be proved without evidence supplied by the defendant. Comment, The Motion of Acquittal: A Neglected Safeguard, 70 Yale L.J. 1151, 1160 (1961). Furthermore, it is far from clear why the government should be relieved from the adverse consequences of its procedural errors when the procedural missteps of defendants are held strictly against them. E.g., Davis v. United States, 411 U.S. 233 (1973).

The principal policy rationale against the waiver doctrine is that the doctrine undermines the privilege against self-incrimination. At the close of the government's case in chief, a defendant is under great pressure to put in his own evidence in order to avoid the almost certain conviction that would otherwise result. If his motion for acquittal has been erroneously denied to protect the government's rights, however, his testimony may fill a gap in the government's case. Although the defendant in such a situation takes the stand of his own choice, it is not a completely free choice, and the pressures that he yields to are of the government's making. Because the waiver doctrine permits affirmance of a conviction obtained under such circumstances, it comes close

to sanctioning compelled self-incrimination.

Whether a federal criminal conviction is affirmed or not should not depend upon which court of appeals is reviewing it. The sufficiency of the evidence in the instant case would have been reviewed had the case been heard by the D.C. or Eighth Circuits. Such an inconsistency within the federal court system should not be allowed to continue. The conflict among the circuits regarding application of the waiver doctrine therefore warrants the grant of certiorari in the instant case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1264

UNITED STATES OF AMERICA
Appellee,

v.

HARTLEY E. GREENLEAF, JR.,
Defendant,Appellant.

No. 82-1265

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM BRATTON,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, U.S.District Judge]

Before
Coffin, Chief Judge,

Campbell and Bowmes, Circuit Judges.

Michael Reilly, with whom Thomas C. Troy, and Troy, Tommasino, Anderson & Reilly, P.C. were on brief, for appellant Hartley E. Greenleaf, Jr.

Michael H. Riley, with whom John P. White, Jr., and White, Inker, Aronson, Connelly & Norton, P.C. were on brief, for appellant William Bratton,

John M. Bowens, Special Attorney, with whom William F. Weld, United States Attorney, Jeremiah T. O'Sullivan, Special Attorney, and Robert M. Waller, Special Attorney, Department of Justice, were on brief, for appellee.

November 2, 1982

COFFIN, Chief Judge. William Bratton and Hartley E. Greenleaf, Jr., appeal from their convictions for twelve separate counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and one count of conducting the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. § 1962. They were tried by a jury in the United States District Court for the

District of Massachusetts.

The defendants were charged with participating with Joseph "Gus" Manning in schemes to defraud the producers of three motion pictures, The Brink's Job, Oliver's Story and International Velvet, by placing on the production company payrolls the names of people who did not work. They were also charged with aiding and abetting Manning, who was a trustee and organizer for Local 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Local 25), in schemes to defraud the Union. The defendants were not alleged to have had any connection with each other in carrying out the schemes. They were appointed by Manning to serve as Teamster Captains on different movies. As Captains, they were responsible for filling out "start slips" for each Teamster employee. The start slips consisted of payroll informa-

tion on one side and an Internal Revenue Service W-4 form on the other. The Captains were also responsible for submitting time cards for the employees and for distributing to them their salary checks.

The government charged that the defendants perpetrated the frauds by forging the start slips and submitting time cards in the names of three men who did not work on the movies: Henry Gatto, William O'Leary and Benjamin DeFlumere. Defendant Greenleaf also filled out a slip and submitted time cards in the name of a fictitious person, Francis Manning. The address listed on the tax and payroll information was that of Gus Manning and it was he who endorsed and cashed the salary checks. The mailings on which the government based the mail fraud charges were W-2 forms sent by the

producers at the end of the year to the "no show" employees at Manning's address and contributions and remittance reports which the producers were required to send to two Teamster pension funds in the names of the "no show" employees.

The indictment alleged a scheme to defraud participated in by Manning, Bratton and Greenleaf.[1] Manning's case was severed after the third day of trial when he complained of chest pains and was admitted to the hospital. The defendants moved for a mistrial because of the severance and the motion was denied.

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1. The indictment also charged Ernest Sheehan with extorting money in furtherance of the fraudulent scheme. His case was severed and continued for health reasons prior to the jury's being sworn.

The jury found Greenleaf guilty on all counts and Bratton on all but one.[2] On appeal, they challenge almost every aspect of the proceeding below.

Adequacy of the Mailings

1. Failure to Object

Appellants challenge the sufficiency of the evidence produced by the government that the mailings charged in the indictment were "for the purpose of executing [the alleged] scheme or artifice" to defraud. The first issue before us is whether the defendants' failure to make that objection at the close of all of the evidence at trial precludes their raising the issue on appeal.

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2. Bratton was found not guilty of Count 11, which charged mail fraud in connection with the motion picture, The Brinks Job, and resulted in the mailing of a W-2 in the name of Henry Gatto.

The defendants moved for acquittal at the close of the government's case and the motion was denied. After introducing their own witness, however, they failed to renew their motion. The rule in this circuit is that a defendant who presents evidence and fails to renew a motion for acquittal is deemed to have waived his original motion. United States v. Kilcullen, 546 F. 2d 435 (1st Cir. 1976). In order to prevail on appeal on that ground, the defendants must then demonstrate "clear and gross" injustice. Id. at 441. The rule is based on the sound principle that evidentiary challenges should be put in the first instance to the trial judge, who is in the best position to rule on such matters. Id.

We see no reason to depart from the Kilcullen rule in this case. By failing to renew their objection to the sufficiency of the evidence at the close of their own

case, the defendants denied the trial judge the opportunity to rule on the motion before sending the case to the jury. To prevail on appeal, therefore, they must demonstrate that their convictions are clearly and grossly unjust. While we find that the connection between the alleged schemes and the mailings poses a close question, we are unable to find that convictions based on those mailings are clearly and grossly unjust.

2. Nexus Between the Mailings and the Fraudulent Scheme

To determine whether there was clear and gross injustice in convicting the defendants of mail fraud on the evidence produced by the government, we examine both the facts surrounding the mailings alleged to have been in furtherance of the schemes and the applicable legal principles. The mailings in this case consisted of W-2 forms mailed to the "no show" workers at Manning's

address by the defrauded producers and of checks and remittance reports mailed by the producers to two employee pension funds on behalf of the "no show" workers. International Velvet was filmed in September and October of 1977. During that time, start slips and time cards were submitted for the "no show" employees and salary checks received in their names. W-2s for those employees were mailed in January of 1978 and pension fund contributions made in their names in April of 1978. Oliver's Story was filmed early in 1978. The Brink's Job was filmed in May and June of 1978. In both cases, the time lag between the receipt of salary checks for the "no show" employees and the mailings of W-2s and pension fund contributions in their names was similar to that in the International Velvet filming. Thus, in each case, the mailings occured a significant time after the receipt of the object

of the scheme -- the fraudulently induced salary checks. The question remaining is whether, despite the time lag, those mailings can be said to have been in furtherance of the fraudulent scheme.

The law is in some confusion regarding when mailings will be found to have been in furtherance of a fraudulent scheme. On one hand, the Supreme Court has made clear that for mailings to be sufficiently closely related to a fraudulent scheme to support mail fraud convictions, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." Pereira v. United States, 347 U.S. 1, 8 (1954). All that is required is that the mailings be "incident to an essential part of the scheme." Id. On the other hand, the Court has indicated that the success of the scheme must be dependent in some way on the mailings, either in obtaining the

desired object or in avoiding or delaying detection of the scheme. United States v. Maze, 414 U.S. 395, 402-03 (1973); Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88 (1944). See also United States v. Blecker, 657 F. 2d 629, 636 (4th Cir. 1981); United States v. Galloway, 664 F. 2d 161, 163 n. 3 (7th Cir. 1981); United States v. Kent, 608 F. 2d 542, 546 (5th Cir. 1979).

Some courts have read the Supreme Court's requirements broadly, accepting as a basis for mail fraud convictions any mailings that can be said to be "normal concomitant[s] of a transaction that is essential to the fraudulent scheme." See, e.g.,United States v. Galloway, supra, 664 F. 2d at 163; United States v. Lea, 618 F. 2d 426, 430 (7th Cir.). See also Ohrynowicz v. United States, 542 F. 2d 715 (7th Cir. 1976). Other courts have been

more restrictive, rejecting mailings that "neither furthered the objective of the scheme. . . nor served to conceal the fraudulent representations." See United States v. Alston, 609 F. 2d 531, 539 (D.C. Cir. 1979). See also United States v. Kennan, 657 F. 2d 41, 43 (4th Cir. 1981); United States v. Brown, 583 F. 2d 659 (3rd Cir. 1978); United States v. Tarnopol, 561 F. 2d 466 (3d Cir. 1977).

The government urges us to adopt a rule that any time a defendant sets in motion a scheme that leads ineluctably to mailings, he can be guilty of mail fraud. Our reluctance to do so stems from the fact that under this test, the conviction in United States v. Maze, supra, would have been affirmed. The mailings in Maze, sales slips of purchases made by the defendant, flowed automatically from his fraudulent use of a stolen credit card. Nevertheless, the Supreme Court held that

the mails were not used for the purpose of executing the fraudulent scheme. 414 U.S. at 405.

There are, on the other hand, significant differences between this case and Maze. The schemes in this case were much broader and more sophisticated than that of Maze. The schemes required for their continuing success the creation of an appearance of business as usual and the mailings at issue here were an integral part of that appearance. In addition, the defendants apparently contemplated the generation of those mailings, since they used Manning's address on the forged W-4 forms in order, one might conclude, to prevent W-2s from being sent to persons who would reveal the scheme.

We need not decide how we would rule on these mailings had the issue been properly raised below. Suffice it to say that we see no such eqregious misapplica-

tion of legal principles as to constitute clear and gross injustice.[3]

Severance

Besides challenging the sufficiency of the government's evidence, the appellants complain of a number of other errors in the proceeding below. They argue, first, that they were prejudiced by being tried together. On appeal, both defendants urge that joinder was improper under Fed. R. Crim. P. 8(b) because there was no evidence that they had participated in the same act or transactions. The only link between their two alleged schemes was Count 26, a substantive RICO count. Neither defendant, however, raised this

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3. Defendant Greenleaf also challenges the sufficiency of the evidence that he had the requisite intent to be guilty of aiding and abetting. We are satisfied that, having heard the evidence that Greenleaf forged names on the W-4 forms and lied to a federal agent and to the grand jury, a reasonable juror could find the requisite intent. The conviction was far from clear and gross injustice.

issue in the district court.[4] Thus, our review is limited to whether there was plain error. United States v. Barbosa, 666 F. 2d 704 (1st. Cir. 1981). We cannot say that joinder of the two defendants alleged to have perpetrated, with a common third party, almost identical schemes to defraud a common enterprise was plain error.

Even though initial joinder may be proper, a defendant may be entitled to severance pursuant to Fed. R. Crim. P. 14 if he can show that he would suffer sub-

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4. Defendant Greenleaf moved before trial for severance on the grounds that the government intended to introduce "as against him statements made by other persons in the nature of admissions or confessions which are not admissible against this defendant and which will prejudice this defendant's right to a fair trial." He did not suggest that joinder was improper under Rule 8(b). Defendant Bratton moved for severance on the fifth day of the trial. He did not specify his grounds. On appeal, he treats that motion as one for misjoinder under Rule 8(b). At that point in the trial, however, his motion, whether construed as an 8(b) challenge to initial joinder or a Rule 14 motion for severance, was too late.

stantial prejudice from a joint trial.[5] United States v. Tashjian, 660 F. 2d 829, 834 (1st Cir. 1981); United States v. Patterson, 644 F. 2d 890, 900 (1st Cir. 1981). Whether a severance should be granted is a question for the trial judge's discretion. United States v. Tashjian, 660 F. 2d at 834. He should be reversed only if defendants can show that his refusal to sever deprived them of a fair trial and resulted in a possible miscarriage of justice. United States v. Barbosa, supra, 666 F. 2d at 708; United States v. Davis, 623 F. 2d 188, 194-5 (1st Cir. 1980).

We are not persuaded that the district court abused its discretion in denying the

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See Rule 12(b). We therefore look only for plain error in the denial of defendant Bratton's motion and find that there was none.

5. As noted in footnote 4, only defendant Greenleaf made a timely motion pursuant to Rule 14.

defendants' motions to sever. The indictment made clear that the defendants were charged in connection with separate motion pictures. Most of the evidence presented related to a particular motion picture. Thus, it is unlikely that the jury confused the evidence against the individual defendants. The trial court emphasized to the jury that the defendants were charged in different counts and that they were to consider separately the evidence as to each count. The fact that defendant Bratton was acquitted on Count 11 reassures us that the jury complied with the court's directives. United States v. Tashjian, supra, 660 F. 2d at 834. In sum, it appears that the defendants suffered no more prejudice "than that which necessarily inheres whenever multiple defendants or multiple charges are jointly tried." Id.; United States v. Adams, 581 F. 2d 193, 198 (9th Cir. 1978).

The Court's Charge to the Jury

Appellant Greenleaf challenges the district court's instruction to the jury. To convict the defendants of mail fraud the government was required to prove that they knowingly and willfully devised the alleged fraudulent scheme. The court charged the jury that "[i]t is reasonable . . . for you to infer that a person ordinarily intends the natural and probable consequences of any act that you find he knowingly did."

We have repeatedly warned against this and similar language that suggests a mandatory inference of intent and thus relieves the government of its burden of proof on the issue of intent. See United States v. Ariza-Ibarra, 605 F. 2d 1216 (1st Cir. 1979)(virtually identical instruction); see also United States v. Winter, 663 F. 2d 1120 (1st Cir. 1981). In Sandstrom v. Montana, 442 U.S. 510 (1979), the Supreme Court held unconstitutional an instruction

that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts", because it suggested a mandatory presumption of intent.

We repeat our warning here, although we do not find that the instruction requires a reversal of the convictions. This instruction is saved by the fact that it makes clearer than did the instruction condemned in Sandstrom that the jury is not required to infer intent from the defendant's actions, and because the instructions taken as a whole adequately informed the jury that the government has the burden of proving intent beyond a reasonable doubt.

Breach of Fiduciary Duty

Appellants' remaining challenges are without merit. Appellant Greenleaf urges that the convictions should be reversed because the indictment alleged that the scheme was devised to defraud both the employer and the appellants' union and

the jury was permitted to convict if it found either portion of the scheme to be proven beyond a reasonable doubt. He challenges the portion of the indictment alleging fraud based on breach of a figuciary duty to Local 25 and its members. Appellant acknowledges that breach of a fiduciary duty may in some cases support a conviction for mail fraud. See United States v. Barta, 635 F. 2d 999, 1006 (2d Cir. 1980) ("§ 1341 reaches some schemes causing intangible loss"). It is not clear whether he would have us find that Manning (whom appellant is charged with aiding and abetting) was not in a fiduciary relationship with the union or whether mail fraud requires an additional duty, not borne by Manning. In either case, we find his arguments unpersuasive. Ruling on pretrial motions to dismiss, the district court specifically addressed the issue of whether Manning was in a fiduciary rela-

tionship with the union sufficient to support a mail fraud count. The court found that "[a]s the union trustee and organizer, he was responsible for negotiating contracts on the union's behalf. This appears to be a 'position of great trust and power' equivalent to that of Barta." See United States v. Barta, supra. It therefore sustained the mail fraud counts alleging breach of a fiduciary duty against Manning, and against Bratton and Greenleaf as his aiders and abetters. We see no reason to reject this finding.

The second half of appellant's challenge -- that mail fraud requires an additional affirmative duty imposed by statute or special circumstance is based on an incorrect reading of the applicable case law. It is well settled that breach of a fiduciary duty, standing alone, does not constitute mail fraud. United States v. Mandel, 591 F. 2d 1347, 1362 (4th Cir.

1979). Appellant relies on United States v. Barta, supra, to argue that the additional requirement must be a specific duty, such as the duty found in Barta, to disclose information. The court in Barta, however, did not indicate that mail fraud requires a breach of a specific duty. It merely noted that "[t]he additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer." 635 F. 2d at 1006. There are other elements that transform a fiduciary breach into mail fraud. The easiest case is where there is a recognizable scheme formed with specific intent to defraud. United States v. Bohonus, 628 F. 2d 1167, 1172 (9th Cir. 1980); United States v. Goss, 650 F. 2d 1336, 1346 (5th Cir. 1981). There are some close questions in this case, but whether there was enough evidence for the jury to find a

recognizable scheme formed with specific intent to defraud is not one of them. There must, of course, be some loss -- though intangible -- to the union, but there was sufficient evidence for the jury to find that the union was deprived at least of the loyal and faithful service and honest representation owed to them by Joseph Manning.

Confrontation Right

Appellant Bratton argues that he was denied his Sixth Amendment right to confront the witnesses against him because he was incriminated by hearsay evidence introduced against Manning and then, when Manning's case was severed for medical reasons, was unable to cross-examine Manning regarding the hearsay statements. The judge instructed the jury to consider the testimony only against Manning. Appellant relies on Bruton v. United States, 391 U.S. 123 (1968), to

argue that "[w]hen powerfully incriminating inadmissible hearsay is introduced into evidence and the defendant is unable to cross-examine the maker of the hearsay statement, the defendant's Sixth Amendment right of confrontation is violated even when the court has instructed the jury to disregard the statement." We agreed. In this case, however, we do not find the statement to have been powerfully incriminating.

The hearsay statement challenged by appellant was related by William O'Leary. O'Leary testified that

> [Manning] said, "We're in trouble." I said, "What do you mean 'we'? He said, "Someone signed an application, used your signature, social security number and put you on the payroll of the Brinks Job."
>
> [Manning] also said, "I yelled at this person for doing this."

Appellant recognized that the statement,

standing alone, is not powerfully incriminating. He argues, however, that the statement must be taken in conjunction with the testimony of another witness who testified that the person who worked as Manning's subordinate on The Brink's Job was Bratton. Even without the hearsay statement, however, there was substantial evidence that Bratton had forged O'Leary's name on the application. Counsel for Bratton admitted as much in his closing argument, when he urged that Bratton had an innocent purpose in writing in O'Leary's name. This case is thus virtually indistinguishable from United States v. DiGregorio, 605 F. 2d 1184, 1190 (1st Cir. 1979), where we held that because "[t]here was substantial evidence independent of the extrajudicial statement to link [the defendant] to the conspiracy . . .[t]he fact that a codefendant's admission tended to corroborate the government's case against [the defendant] is

simply not enough" to satisfy the "powerfully incriminating" standard of Bruton.

Consecutive Sentences for RICO and Mail Fraud

Finally, both appellants argue that the court's imposition of consecutive sentences for the RICO convictions and for the predicate offenses of mail fraud violates the Double Jeopardy Clause. We are persuaded that RICO and mail fraud constitute separate offenses, see United States v. Boylan, 620 F. 2d 359, 361 (2d Cir. 1980), and that Congress intended to impose separate sentences for each offense. United States v. Rone, 598 F. 2d 564, 571-72 (9th Cir. 1979).

The judgment of the district court is affirmed.

Nos. 82-1172 and 82-1225

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM BRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

HARTLEY E. GREENLEAF, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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QUESTIONS PRESENTED

1. Whether petitioners waived their right to challenge the sufficiency of the evidence on appeal when, after the denial of their motions for acquittal at the close of the government's case, they introduced evidence on their own behalf and then failed to renew their acquittal motions at the conclusion of all the evidence.

2. Whether the district court's imposition of consecutive sentences for the RICO offense and the predicate acts of mail fraud violated the Double Jeopardy Clause.

3. Whether the district court gave an improper proof-of-intent instruction.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1172

WILLIAM BRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1225

HARTLEY E. GREENLEAF, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (82-1172 Pet. App. 1-26) is reported at 692 F.2d 182.

JURISDICTION

The judgment of the court of appeals (82-1225 Pet. App. 2a) was entered on November 2, 1982. The petition for a writ of certiorari in No. 82-1172 was filed on January 3, 1983. The petition in No. 82-1225 was filed on January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were each convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, and on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (82-1172 Pet. 3; 82-1225 Pet. App. 1a). Petitioner Bratton was also convicted on one count of interstate transportation of fraudulently obtained property, in violation of 18 U.S.C. 2314 (82-1172 Pet. 3). Petitioner Bratton was sentenced to three years' imprisonment on the RICO count and to concurrent two-year terms of probation on each of the other counts, to commence at the completion of the sentence on the RICO count. Petitioner Greenleaf was sentenced to two years' imprisonment on the RICO count, followed by concurrent terms of two years' probation on the remaining counts. Each petitioner was fined $2,500. The court of appeals affirmed (82-1172 Pet. App. 1-26).

1. The evidence at trial is summarized in the opinion of the court of appeals (82-1172 Pet. App. 3-5, 8-9). It showed that petitioners were appointed by Joseph "Gus" Manning, a trustee and organizer for Local 25 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, to serve as Teamster "captains" during the production of certain motion pictures (*id.* at 3). As captains, petitioners were responsible for filling out "start slips" for Teamster employees who were hired to drive motor vehicles during the filming of the movies (*id.* at 3, 9). The captains were also responsible for submitting time cards for the employees and for distributing the resultant salary checks (*id.* at 4).

While serving as captains, petitioners forged start slips and submitted time cards for four men who did not work on the movies (82-1172 Pet. App. 4).[1] The start slips consisted of payroll information on one side and an IRS W-4 form on the other (*id.* at 3-4). Petitioners gave the address of Gus Manning as the address of the purported employees on the W-4 forms, and Manning endorsed and cashed the salary checks (*id.* at 4). The mail fraud charges were based on the W-2 forms mailed by the movie producers at the end of the year to the "no show" employees at Manning's address, as well as pension fund contributions and remittance reports that were mailed to two Teamster pension funds in the names of the "no show" employees (*id.* at 4-5, 8-9).[2]

2. On appeal, petitioners contended, *inter alia*, that there was an insufficient nexus between the mailings and the scheme to defraud to justify their mail fraud convictions. Relying on established First Circuit precedent (*United States* v. *Kilcullen*, 546 F.2d 435 (1976), cert. denied, 430 U.S. 906 (1977)), the court of appeals held (82-1172 Pet. App. 7) that petitioners had waived this objection by failing to renew their unsuccessful motions for acquittal at the close of all the evidence. The court therefore stated that petitioners' sufficiency of the evidence claim would be reviewed under a "clear and gross" injustice standard (*ibid.*).

Applying that standard of review (82-1172 Pet. App. 8-14), the court of appeals concluded that there was a

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[1]One start slip, submitted by petitioner Greenleaf, was filled out in the name of a fictitious person (82-1172 Pet. App.4). The other slips were submitted in the names of actual persons who did not perform any work on the movies (*ibid.*).

[2]Petitioners were not alleged to have had any connection with each other in carrying out the schemes (82-1172 Pet. App. 3).

sufficient nexus between the mailings and the fraudulent scheme to sustain petitioners' convictions. The court noted that "the schemes required for their continuing success the creation of an appearance of business as usual," and the "the mailings at issue here were an integral part of that appearance" (*id.* at 13). The court also observed that "the defendants apparently contemplated the generation of [the] mailings, since they used Manning's address on the forged W-4 forms in order, one might conclude, to prevent W-2s from being sent to persons who would reveal the scheme" (*ibid.*). The court of appeals expressly declined to decide, however, how it would have ruled if the issue had been properly preserved (*ibid.*).

ARGUMENT

1. Petitioners contend (82-1172 Pet. 9-16; 82-1225 Pet. 10-12) that the court of appeals erred in holding that they waived their motions for judgment of acquittal on the grounds of insufficient evidence when they introduced evidence in their defense and then failed to renew their acquittal motions at the conclusion of trial. Petitioners assert that their introduction of evidence did not operate as a waiver of their motions and renewal was therefore unnecessary. Ten courts of appeals, however, have held to the contrary. See *United States* v. *Kilcullen, supra,* 546 F.2d at 441; *United States* v. *Keuylian,* 602 F.2d 1033, 1040-1041 (2d Cir. 1979); *United States* v. *Trotter,* 529 F.2d 806, 809 n.3 (3d Cir. 1976); *United States* v. *Stradley,* 295 F.2d 33, 35 (4th Cir. 1961); *United States* v. *Sanders,* 639 F.2d 268, 269 (5th Cir. 1981); *United States* v. *Swainson,* 548 F.2d 657, 662-663 (6th Cir.), cert. denied, 431 U.S. 937 (1977); *United States* v. *Tubbs,* 461 F.2d 43, 45 (7th Cir.), cert. denied, 409 U.S. 873 (1972); *United States* v. *Sanders,* 547 F.2d 1037, 1040 n.5 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977); *United States* v. *Figueroa-Paz,* 468 F.2d 1055, 1058-1059 (9th Cir. 1972); *United States* v. *Morris,* 623

F.2d 145, 152 (10th Cir.), cert. denied, 449 U.S. 1065 (1980)). This Court, moreover, has indicated its approval of the waiver rule. See *McGautha* v. *California*, 402 U.S. 183, 215-216 (1971); *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954).[3]

The introduction of evidence by the defense operates as a waiver of any objection to the denial of a motion for acquittal at the close of the government's case because a reviewing court is entitled to consider the sufficiency issue on the basis of all the evidence in the case, including the evidence introduced by the defense. See *McGautha* v. *California*, *supra*, 402 U.S. at 215. A renewed motion for acquittal at the conclusion of the trial is thus necessary in order to afford the district judge, who is in the best position to evaluate the evidence, an opportunity to rule on the sufficiency claim in the first instance. See *United States* v. *Kilcullen*, *supra*, 546 F.2d at 441.[4]

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[3]Petitioners cite cases from the Seventh and Eighth Circuits (82-1172 Pet. 11; 82-1225 Pet. 16) in which the waiver rule has not been invoked. See *United States* v. *Rizzo*, 416 F.2d 734, 736 n.3 (7th Cir. 1969); *United States* v. *Burton*, 472 F.2d 757, 763 (8th Cir. 1973). However, in post-*Rizzo* Seventh Circuit cases, the waiver rule has been repeatedly endorsed. See *United States* v. *Kampiles*, 609 F.2d 1233, 1238 & n.8 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980); *United States* v. *Fearn*, 589 F.2d 1316, 1321 (7th Cir. 1978); *United States ex rel. Curtis* v. *Illinois*, 521 F.2d 717, 722 (7th Cir.), cert. denied, 423 U.S. 1023 (1975). And the present approach in the Eighth Circuit is to review sufficiency of the evidence claims under the plain error rule where the issue has not been properly preserved. See *United States* v. *Sanders*, *supra*, 547 F.2d at 1040 n.5. That approach is essentially identical to the one employed by the court below.

[4]Petitioner Bratton argues (82-1172 Pet. 14) that the waiver rule is unfair because it "protects * * * inherently defective government cases that could never be proved without evidence supplied by the defendant." As one commentator has pointed out, however, the notion that federal prosecutors "knowingly commence prosecution in weak cases

As petitioners point out, the District of Columbia Circuit does not apply the waiver rule. Rather, where a defendant moves for acquittal at the close of the government's case in chief, the court of appeals tests a sufficiency of the evidence claim against the evidence presented by the government. See, *e.g., United States* v. *Pardo*, 636 F.2d 535, 547 (D.C. Cir. 1980); *United States* v. *Watkins*, 519 F.2d 294, 297 (D.C. Cir. 1975). Any conflict between the District of Columbia cases and the decision here, however, is not of sufficient importance to warrant review, particularly in light of this Court's decisions endorsing the waiver rule (*McGautha* v. *California, supra; United States* v. *Calderon, supra*), and the fact that, under the "clear and gross" injustice standard applied by the court below, "essentially unfounded conviction[s]" would not be sustained. *United States* v. *Kilcullen, supra*, 546 F.2d at 441.

In any event, resolution of petitioners' asserted conflict over the waiver issue would not affect the ultimate disposition of this case because the mailings are sufficient to support petitioners' mail fraud convictions even under the ordinary standard of appellate review. In *United States* v. *Maze*, 414 U.S. 395, 403 (1974), this Court stated that mailings are sufficiently closely related to a fraudulent scheme under the mail fraud statute where they "lull the

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with the idea that defendants will be forced to convict themselves * * * is dubious." 8A J. Moore, *Moore's Federal Practice*, para. 29.05 n.8 (2d ed. 1982). Nor does the waiver rule undermine the privilege against self-incrimination because a defendant who chooses to testify as a result of the denial of his motion for acquittal takes the risk that his testimony will fill a gap in the government's case (82-1172 Pet. 15). Such a defendant is perfectly free to rest on his motion instead of testifying or to put on a defense consisting of evidence other than his own testimony; requiring such hard choices is not unconstitutional. See *McGautha* v. *California, supra*, 402 U.S. at 213; *United States* v. *Figueroa-Paz, supra*, 468 F.2d at 1059. In any event, neither petitioner in this case chose to testify.

victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely." Here, the court of appeals correctly found (82-1172 Pet. App. 13) that the mailing of the W-2 forms and the remittance reports advanced the fraudulent scheme by creating "an appearance of business as usual." Further, the court correctly held that the evidence permitted the inference that petitioners used Manning's address on the forged W-4 forms in order to prevent W-2 forms from being sent to "no-show" employees who might reveal the scheme (*ibid.*). Thus, the nexus between the mailings and the fraudulent scheme was sufficiently close to support the mail fraud convictions.

Contrary to the assertion of petitioner Greenleaf (82-1225 Pet. 19), it is of no consequence that the mailings occurred about three months after the receipt of the paychecks that were the fruit of the fraudulent scheme. The courts have held that the sufficiency of a mailing to support a mail fraud conviction " 'does not turn on time or space, but on the dependence in some way of the completion of the scheme or the prevention of its detection on the mailing in question.' " *United States* v. *Blecker*, 657 F.2d 629, 636 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982), quoting *United States* v. *La Ferriere*, 546 F.2d 182, 187 (5th Cir. 1977); *United States* v. *Kent*, 608 F.2d 542, 546 (5th Cir. 1979), cert. denied, 446 U.S. 936 (1980). As shown above, the mailings in this case were crucial to the completion of petitioners' fraudulent scheme and the prevention of its detection.[5]

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[5]Because the nexus between the mailings and the fraudulent scheme was sufficient to support petitioners' mail fraud convictions under the ordinary standard of appellate review, petitioner Greenleaf's claim (82-1225 Pet. 18-22) that the nexus was insufficient even under the "clear and gross" injustice standard applied by the court of appeals is plainly without merit.

2. Petitioner Greenleaf contends (82-1225 Pet. 25-31) that the district court erred in imposing cumulative penaltes for the RICO offense and the predicate acts of mail fraud. In his view, the predicate acts of mail fraud are lesser-included offenses within the substantive RICO count, and thus the imposition of cumulative penalties is prohibited by the Double Jeopardy Clause.

Even if petitioner's argument were correct, however, his total sentence would be unchanged. The substantive RICO offense requires only two predicate acts of racketeering and petitioner was convicted on four counts of mail fraud. Thus, even assuming that two mail fraud counts somehow merged with the RICO offense, petitioner's conviction on the remaining mail fraud counts would be unaffected and would sustain his overall sentence.

In any event, petitioner's double jeopardy contention was correctly rejected by the court below (82-1172 Pet. App. 26). The RICO statute clearly evidences Congress' intent to authorize cumulative sentences for the RICO offense and its predicate acts of racketeering. As the court of appeals explained in *United States* v. *Rone*, 598 F.2d 564, 572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980):

> Congress clearly intended the Act to provide for new penal prohibitions and enhanced sanctions. If we were to accept appellants' theory that sentences imposed under RICO and those imposed for the predicate offenses may not run consecutively, then Congress' purpose would be thwarted. If the RICO sentence must run concurrently with a sentence for any predicate crime, there would be no "enhanced" penalties. A conviction under RICO would, in fact, grant immunity for the offenses charged in the "pattern of racketeering." With the maximum penalties for RICO violations

> much less than those that might be obtained for the series of predicate crimes (18 U.S.C. § 1963), the RICO statutes would be rarely used.

Where cumulative penalties are authorized by statute, the imposition of such penalties in a single sentencing proceeding following a single trial does not violate the Double Jeopardy Clause (*Albernaz* v. *United States*, 450 U.S. 333, 344 (1981)), and the courts of appeals have consistently sustained consecutive sentences for RICO offenses and the underlying racketeering acts. See *United States* v. *Dean*, 647 F.2d 779, 785 n.14 (8th Cir. 1981), cert. denied, 456 U.S. 1006 (1982); *United States* v. *Morelli*, 643 F.2d 402, 413 (6th Cir.), cert. denied, 453 U.S. 912 (1981); *United States* v. *Boylan*, 620 F.2d 359, 361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Rone*, *supra*, 598 F.2d at 571-572.

3. Under the mail fraud statute the government was required to show that petitioners caused the mailings at issue with the specific intent to defraud. See *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). The district court instructed the jury (2 A. 749)[6] that

> an intention may be inferred by you from the surrounding circumstances, including the acts and conduct of a defendant. The guilty knowledge cannot be proved by merely showing negligence, carelessness or foolishness on the part of the defendant. It is reasonable, however, for you to infer that a person ordinarily intends the natural and probable consequences of an act that you find he knowingly did.

Invoking this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), petitioner Greenleaf contends (82-1225

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[6]"A." refers to the appendix in the court of appeals.

Pet. 32-37) that the above instruction was improper because it shifted the burden of proof to the defense on the matter of intent.

In *Sandstrom, supra,* 442 U.S. at 517-519, 524 (emphasis omitted; citation omitted), the Court found unconstitutional an instruction that " 'the law presumes that a person intends the ordinary consequences of his voluntary acts' " because the instruction could be interpreted as a direction to the jury to find the requisite intent or as an imposition of the burden of persuasion on the defendant. Here, however, the court instructed the jury in terms of "inference," not "presumption." See *Sandstrom, supra,* 442 U.S. at 527-528 (Rehnquist, J., concurring). Moreover, the instruction did not compel the jury to infer intent based on the surrounding circumstances, but merely advised it that it may do so. This distinction between mandatory presumptions and permissible inferences is widely recognized by the federal courts of appeals. See, *e.g., Pigee* v. *Israel,* 670 F.2d 690, 693-695 (7th Cir. 1982) cert. denied, No. 81-6802 (Oct. 4, 1982); *United States* v. *Davis,* 608 F.2d 698, 699 (6th Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Mayo,* 646 F.2d 369, 375 (9th Cir.), cert. denied, 454 U.S. 1127 (1981).[7] Furthermore, "a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414

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[7]Petitioner's reliance on previous decisions of the court below (82-1225 Pet. 33) is unavailing. The instruction involved in *United States* v. *Winter,* 663 F.2d 1120, 1143 (1st Cir. 1981), stated that the jury could "presume" that a person intends the natural and probable consequences of his act. The case, therefore, is inapposite to the instruction at issue here, which was couched in terms of inference rather than presumption. In *United States* v. *Ariza-Ibarra,* 605 F.2d 1216, 1228 (1st Cir. 1979), the court stated that an instruction substantially identical to the one here "came perilously close to * * * error" but it found it unnecessary to decide the issue. In any event, intra-circuit conflicts do not warrant this Court's review.

U.S. 141, 146-147 (1973). Examined in this light, the jury could not have construed the court's charge as shifting the burden of proof to the defense on the matter of intent. The court repeatedly instructed the jury that the defense had no burden of proof at all while the government had the burden of proving beyond a reasonable doubt every element of the crime, including intent (2 A. 725-728, 735, 747-749, 751-756, 759).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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